

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALICIA HARRIS,

No. C-08-5198 EMC

Plaintiff,

v.

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND**

VECTOR MARKETING CORPORATION,

(Docket Nos. 121, 125)Defendant.

Currently pending before the Court are the parties' cross-briefs as to whether Plaintiff should be given leave to amend her complaint. Plaintiff seeks leave to amend her complaint so as (1) to include factual allegations that Defendant failed to pay her for qualified sales presentations ("QSPs") and (2) to assert legal claims based on that failure to pay. The Court previously determined that the QSP claim had not previously been asserted and that the claim was based on an entirely different set of facts than those comprising the claim that Defendant failed to pay for training time. The key operative facts of the QSP claim has little, if anything, to do with the prior claim. The Court thus determined Plaintiff's newly asserted QSP claim was tantamount to a proposal to amend her complaint to allege a new claim and has deemed it as such. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **DENIES** Plaintiff's deemed request for leave to amend.

As a preliminary matter, the Court notes that, based on her previously filed case management statement, Plaintiff appeared to be making a QSP claim on state law only, and not federal law, *i.e.*, the Fair Labor Standards Act ("FLSA"). At the hearing, Plaintiff acknowledged, after questioning

1 by the Court, that it would be possible to bring a QSP claim based on the FLSA (*i.e.*, for failure to
2 pay wages) and affirmed that she would like to proceed with the QSP claim under both state and
3 federal law.¹ Thus, the question for the Court is whether such an amendment should be permitted
4 under Federal Rule of Civil Procedure 15.

5 Rule 15 provides that, after the initial period for amendments as of right, pleadings may be
6 amended only by leave of court, and leave should be freely given “when justice so requires.” Fed.
7 R. Civ. P. 15(a)(2). “Four factors are commonly used to determine the propriety of a motion for
8 leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of
9 amendment.” *Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007) (internal quotation marks
10 omitted).

11 In the instant case, the Court agrees with Defendant that there has been undue delay on the
12 part of Plaintiff in seeking leave to amend. This case was filed approximately eighteen months ago.
13 Plaintiff knew from the outset of the case that she was allegedly not paid for her QSPs. She
14 admitted this when she was deposed in March 2009, her attorneys knew that she had purportedly not
15 been paid. *See* Lien Decl., Ex. B (Harris Depo. at 102) (testifying that she was not paid for twenty
16 QSPs). And yet no action was taken to amend the complaint to include a QSP claim until only
17 recently, eighteen months after this case was filed. This is especially problematic given that
18 previously Plaintiff asked for and/or took numerous opportunities to amend her complaint. Why
19 Plaintiff did not seek to include the QSP claim at one of those earlier times is not explained.

20 Plaintiff tries to argue that, even though this case is some eighteen months old, “it is truly a
21 case which does not show its age” and that, “measured in terms of work performed on the class
22 issues, . . . [the] case is actually in its infancy.” Pl.’s Br. at 2. But this argument is unavailing. The
23 fact that the case was being mediated early on in the proceedings did not bar Plaintiff from seeking
24 to include a new claim based on the alleged failure to pay for QSPs. Likewise, that there were early
25 summary judgment proceedings did not preclude Plaintiff from seeking leave to amend. A fair
26

27 ¹ At the hearing, the Court noted that, if a FLSA claim were viable and Plaintiff asserted the state
28 claim but not the FLSA claim, that would be problematic as that would appear to be contrary to the
interests of the putative class.

1 amount of discovery has already taken place. The fact remains that this case has been pending for
2 18 months and is now on a strict schedule for expedited consideration of class certification and
3 discovery carefully sequenced as part of a larger pretrial and trial schedule. Plaintiff offers no
4 excuse for the failure to seek an amendment months ago.

5 However, the fact that Plaintiff has delayed in seeking leave to amend is not dispositive.
6 Indeed, under Ninth Circuit law, “[d]elay alone is insufficient to justify denial of leave to amend; the
7 party opposing amendment must also show that the amendment sought is futile, in bad faith or will
8 cause undue prejudice to the opposing party.” *Jones v. Bates*, 127 F.3d 839, 847 n.8 (9th Cir. 1997);
9 *see also* *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) (stating that “delay alone no
10 matter how lengthy is an insufficient ground for denial of leave to amend” and that “[o]nly where
11 prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other
12 litigants when they deny leave to amend a pleading”).

13 In its papers, Defendant contends that prejudice may be established by the mere fact that
14 more discovery would have to be taken if an amendment were permitted. *See* Def.’s Br. at 7. But
15 the authority cited by Defendant does not set forth that broad a proposition. In fact, each of the
16 cases cited by Defendant indicates that prejudice arises based on timing issues. For example, in
17 *Jackson v. Bank of Hawaii*, 902 F.2d 1385 (9th Cir. 1990), the plaintiff sought leave to amend
18 approximately a year after the discovery deadline. *See id.* at 1387 (noting that trial court had
19 “established a firm discovery completion deadline of June 30, 1987” and that, “[o]n June 3, 1988,
20 appellants filed a motion to amend the complaint”). Thus, the fact that additional discovery would
21 be needed for the new claims was clearly prejudicial in light of the procedural stage of the case. In
22 *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1990), the Ninth Circuit agreed with the
23 district court that “adding the new causes of action would require the County to conduct further
24 discovery, resulting in additional expense and further *delay*.” *Id.* at 1323 (emphasis added). And in
25 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006), the court concluded
26 that there would be prejudice because the plaintiff’s proposed amendment advanced different legal
27 theories requiring proof of different facts at a stage in the litigation which would require the parties
28 to “scramble” to complete discovery. *Id.* at 953 (also noting that allowing amendment would

1 “unfairly impose[] potentially high, additional litigation costs on Dialysist West that could have
2 easily been avoided had AmerisourceBergen pursued its ‘tainted product’ theory in its original
3 complaint or reply”).

4 That being said, even taking a more limited interpretation as to what may constitute
5 cognizable prejudice for purposes of amending the complaint, the Court finds there is prejudice. As
6 noted above, Plaintiff wishes to include a QSP claim under the FLSA but, under the Court’s case
7 management schedule, Plaintiff’s motion for conditional FLSA certification must be filed in less
8 than two weeks (*i.e.*, on April 14, 2010). *See* Docket No. 126 (Order, Ex. A). As of date, little to
9 none of the discovery that has taken place in this case has dealt with the QSP issue. In other words,
10 effectively all the discovery needed for the FLSA conditional class certification must take place
11 within the span of weeks.

12 In an effort to ascertain whether the amendment and ensuing discovery would delay the
13 scheduled events contained in this Court’s current CMC order, including conditional class
14 certification, the Court directed Plaintiff to describe in detail the discovery it intended to take as to
15 the QSP claim certification. In response, she described a 30(b)(6) deposition, 5-10 depositions of
16 local managers and vaguely described the kind of documents she expected to review. Specifically,
17 she would take a 30(b) deposition of Vector and/or depose Paul Matheson, Vector’s Legal Affairs
18 Manager; also, she would take the depositions of five to ten of Vector’s managers at the local level
19 (*i.e.*, the managers of the sales representatives).² At the hearing, Plaintiff reiterated that she needed
20 little discovery and therefore the two-week time period currently provided in the CMC schedule was
21 not a problem. At the hearing, Plaintiff intimated she might not need any document production.
22 Finally, as part of her own independent investigation (and not formal discovery), she would be
23 contacting potential class members about their experiences with payments for QSPs.

24 The Court finds Plaintiff’s professed ability to conduct the discovery and investigation
25 outlined above within a two-week period overly optimistic to say the least. Defendant contends
26 there have been approximately 150 local managers in the state over the past five years and that

27
28 ² Vector asserts that, like the sales representatives, the local managers are independent contractors.

1 nearly 60% of the 54,000 class members submitted at least one, if not more than one, QSP claim.
2 There are likely hundreds of thousands of QSP documents involved, spread over 70 offices
3 throughout the state. Local managers are tasked with the initial vetting of QSP claims. After review
4 and possible investigation, the managers submit to the corporate office for final decision and
5 payment QSP claims which the managers conclude warrant payment.

6 As Defendant pointed out in its papers, there are substantial questions whether (as Plaintiff
7 contends) Defendant had a corporate culture that incentivized local managers to deny payment for
8 QSP claims and whether in fact there was a widespread practice by local managers to wrongfully
9 deny such claims. There are further questions whether, even when local managers submit such
10 claims, there is a pattern or practice at the corporate level to wrongfully deny QSP claims. At the
11 hearing, Plaintiff's counsel introduced yet another factual scenario: that local managers discouraged
12 salespersons from even submitting QSP claims in the first place. Given the multifaceted factually
13 complex issue, class certification under either Rule 23 or conditionally under the FLSA appears to
14 be a daunting task and, in any event, will require a proffer of substantial evidence on these
15 questions. Discovery is bound to be complex and lengthy. Plaintiff's ability to demonstrate she is
16 similarly situated to other class members as required for conditional certification under the FLSA is
17 thus complicated and informed by many competing variables, scenarios and explanations which are
18 likely to emerge.³

19 The Court is not convinced that the brief and truncated discovery and investigation outlined
20 by Plaintiff would be sufficient for conditional class certification to proceed. As just one small
21 example, a sampling of five to ten local managers seems hardly adequate given Defendant's
22 representation that, "[o]ver the past five years, there have been over 150 local . . . managers running
23 Vector sales offices in California" and the many possible scenarios involving alleged wrongful
24 denials of QSP claims. (Matheson Decl. ¶ 8). It is also unrealistic to expect that no document
25 production is necessary even as to these 5-10 deponents. The local managers will not likely be able
26 to provide such basic information about the numbers of requests for payment that they approved and

27
28 ³ Indeed, there appears to be a dispute as to whether Plaintiff herself submitted QSP claims
which were then wrongfully denied.

1 denied without going through documents in their possession, custody, or control, much less defend
2 or explain individualized decisions to particular QSP claims.

3 Not only has Plaintiff vastly underestimated the likely scope of discovery in view of the size
4 and complexion of the QSP issue, she has not taken into account the work that Defendant must
5 undertake in defense and rebuttal of Plaintiff's contentions. As an example, affidavits of putative
6 class members Plaintiff intends to submit in support of her request for certification must be subject
7 to cross-examination and investigation by Defendant for possible rebuttal. In addition to deposing
8 these affiants Defendant will need time to gather testimonial and documentary evidence in response.
9 Documents corroborating or contradicting various contentions of the parties will play a significant
10 role in the evaluation of the parties' position. Defendant will have to examine tens if not hundreds
11 of thousands of records, interview an adequate sampling of the 150 local managers and corporate
12 employees to oppose Plaintiff's contention that she and others were wrongfully denied
13 compensation for QSPs and that she is similarly situated to other class members. Plaintiff in turn
14 will undoubtedly want an opportunity to take discovery relative to counter affidavits filed by
15 Defendant.

16 The need and scope of discovery is likely to expand as the parties' respective positions
17 emerge. This cannot happen in the span of a few weeks, particularly in light of the ongoing
18 discovery already pending on Plaintiff's current claims.

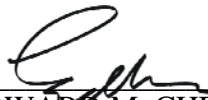
19 The Court therefore concludes that permitting Plaintiff's proposed amendment would be
20 unduly prejudicial. Necessary discovery and briefing cannot be accomplished within the case
21 management schedule in this case. While Plaintiff has suggested that this prejudice could be cured
22 by altering the schedule, the Court will not do so. The Court has already substantially deferred the
23 trial date in this case. As this case is already a year and a half old, the Court has now established a
24 specific schedule for conditional class certification, discovery, and class certification that already
25 contains compressed time periods. The sequencing of events does not allow for delay without
26 upending the entire schedule, including trial. Allowing the discovery needed in connection with
27 certification of this new, unrelated factually complex claim will doubtlessly cause delay and upset
28 the trial schedule. *See Jordan*, 669 F.2d at 1323.

1 In light of the fact that Plaintiff offers no excuse for asserting the QSP claim so belatedly and
2 the prejudice that would obtain were the claim now included in this suit, Plaintiff's motion for leave
3 to amend is denied.

4 This order disposes of Docket Nos. 121 and 125.

5
6 IT IS SO ORDERED.

7
8 Dated: April 5, 2010

9
10 
11 EDWARD M. CHEN
12 United States Magistrate Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28